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Title:

Trade Practices Bill 1974: Explanatory memorandum

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1974

AUSTRALIA

HOUSE OF REPRESENTATIVES

TRADE PRACTICES BILL 1974

EXPLANATORY MEMORANDUM

(Circulated by the Minister for Manufacturing
Industry, the Hon. Kep. Enderby, M.P., Q.C.)

TRADE PRACTICES BILL 1974

EXPLANATORY MEMORANDUM

The Bill is to replace the Restrictive Trade Practices Act 1971-1973 and is also to make provision for the protection of consumers from certain unfair practices.

RESTRICTIVE TRADE PRACTICES

Differences between provisions of Bill and existing Restrictive Trade Practices Act

2. The main differences between the proposed restrictive trade practices provisions and the existing Act are -
- (a) Practices are to be prohibited by the Act itself instead of by ad hoc restraining orders made by the Trade Practices Tribunal after time-consuming inquiries.
 - (b) Private individuals will be able to take court proceedings in respect of prohibited practices.
 - (c) 'Vertical' exclusive dealing arrangements are prohibited in certain circumstances.
 - (d) Limitations to the scope of the present practice of discriminatory dealing are removed.
 - (e) Anti-competitive mergers are covered.
 - (f) A Trade Practices Commission constituted by several members is to replace the Commissioner of Trade Practices.
 - (g) The Trade Practices Tribunal will become a body to review determinations by the Commission. It will also retain its existing functions under the overseas

cargo shipping provisions.

3. The existing provisions with respect to resale price maintenance are to be re-enacted subject to minor amendments and to the omission of the provisions for exemptions.

4. The existing provisions with respect to overseas cargo shipping are to be re-enacted without amendment.

Scheme of the restrictive trade practices provisions

5. The Bill prohibits the following practices:

- (a) contracts, arrangements and understandings in restraint of trade or commerce,
- (b) monopolization,
- (c) exclusive dealing,
- (d) resale price maintenance,
- (e) price discrimination,
- (f) anti-competitive mergers.

6. A person who engages in a prohibited practice will be liable for a pecuniary penalty and to other civil remedies. Private persons as well as the Attorney-General and the Commission will be able to take action in the Court against a person who engages in such a practice.

7. The Bill recognizes that in certain circumstances some prohibited practices may be capable of justification. To meet these cases a procedure is provided by which the Commission can grant authorizations to persons to engage in conduct that is otherwise prohibited. Before granting an authorization the Commission must be satisfied that an authorization is justified on certain broad grounds that are specified in the Bill. A person dissatisfied with the Commission's refusal to grant an authorization will be able to have the decision reviewed by the

Trade Practices Tribunal.

8. Conduct that is covered by an authorization that is currently in force will be immune from enforcement action. Thus to gain the protection of an authorization parties will need to apply in advance for an authorization in relation to conduct that they propose to engage in. An initial four month period will be allowed after the Act comes into operation to enable parties to existing arrangements that may be covered by the prohibition of contracts in restraint of trade or commerce and exclusive dealing to seek authorizations from the Commission.

9. In relation to the restraint of trade or commerce, exclusive dealing and merger provisions, the Bill enables parties to seek clarification of the question whether a proposed practice would affect competition to the extent necessary for the application of the relevant provisions. This can be done by an application to the Commission for a 'clearance'. A clearance by the Commission will protect a party from enforcement action. If, in a particular case, the Commission were not prepared to grant a 'clearance' enforceability would depend on the applicability of the relevant provision and this would be a matter for the Court to determine in the usual way.

10. The difference between a clearance and an authorization is that the former results in the Act being treated as inapplicable while the latter assumes that the Act is applicable but grants a dispensation.

Main Provisions with Respect to Restrictive Trade Practices

Constitutional Foundation

11. The Bill is drawn primarily around the corporations power, but clause 6 provides for the Act to have an additional operation in reliance on other available powers.

The Trade Practices Commission

12. Clauses 7-29 provide for a Trade Practices Commission. The number of members of the Commission that may be appointed is left to the Governor-General. No specific qualifications are required for members of the Commission. There is to be a Chairman and one Deputy Chairman of the Commission. Remuneration and allowances will be at rates fixed by the Remuneration Tribunal, but until so fixed will be at rates prescribed by regulation.

13. The Commission will be able to function in Divisions constituted by no less than 3 members including the Chairman. The Chairman will not be required to attend all meetings of a Division (clause 19).

14. Clause 17 provides for the Chairman and members of the Commission to disclose conflicting interests. These provisions are in line with those that have applied to the Tribunal and the Commissioner.

15. There is provision with respect to meetings of the Commission (clause 18) and with respect to public hearings (clause 21).

16. The Commission is to have a staff employed under the Public Service Act, and the Chairman of the Commission is to have the powers of a Permanent Head (clause 27). This staff will replace the existing staff of the Commissioner of Trade

Practices.

17. The Commission will be subject to any written direction that the Attorney-General may give in relation to the performance of its functions or the exercise of its powers other than its functions and powers in relation to the granting of authorizations and clearances (clause 29(1)). Any such direction must be published in the Gazette as soon as practicable after it is given (clause 29(2)). The Commission will also be required to comply with any request by the Parliament for information about the performance by the Commission of its functions (clause 29(3)).

The Trade Practices Tribunal

18. The Trade Practices Tribunal is to be continued in existence (clause 30).

19. The Tribunal will be a body to review decisions of the Commission on applications for authorizations (Part IX). The existing provisions for a Review Division constituted by three presidential members become unnecessary and are to be omitted.

Contracts, arrangements and understandings in restraint of trade or commerce

20. These are dealt with by clause 45. Contracts, arrangements and understandings covered by the clause are prohibited by sub-clause (2). In addition sub-clause (1) declares such contracts, if made before the commencement of the clause, to be unenforceable.

21. Clause 45(3) makes it clear that a contract, arrangement or understanding is not prohibited if it has such a slight effect on competition as to be insignificant.

22. Sub-clause (4) excludes from the operation of the clause resale price maintenance and exclusive dealing, because they are dealt with by other provisions. Sub-clause (5) excludes mergers in respect of which a clearance or authorization has been granted. Sub-clause (6) excludes contracts, arrangements and understandings between companies that are related to each other. Sub-clause (7) enables a contract to be made conditional upon the grant of an authorization or clearance.

23. The prohibitions in clause 45 are subject to any authorization or clearance that may be granted under Part VII (contracts etc. for which authorizations are not possible are indicated in para. 41 below). Clause 45 will not operate until four months after the commencement of the Act (clause 2(4)) and in this period parties to existing contracts, arrangements and understandings will be able to seek clearances, authorizations, or interim authorizations, from the Commission.

Monopolization

24. Clause 46 prohibits a monopolist (being a person who is in a position substantially to control a market) from taking advantage of the power he has by virtue of being in that position to -

- (a) eliminate or substantially damage a competitor,
- (b) prevent the entry of a person into the market,
- or
- (c) deter or prevent a person from engaging in competitive behaviour.

25. Clause 46 does not apply to mergers that may lead to

the acquisition by a person of a monopoly position. (Sub-clause (3)) Such mergers are dealt with separately by clause 50.

26. There is no provision for authorizations or clearances in respect of monopolization as such, but the practice does not cover agreements or arrangements that have been authorized or cleared under other provisions (clause 46(3)).

Exclusive dealing

27. Exclusive dealing is defined in clause 47. It covers arrangements in accordance with which a supplier of goods or services has entered into an arrangement with a person acquiring those goods or services from him and the effect of the arrangement is to limit the freedom of that person to deal as regards persons or places.

28. Under clause 47 there are three forms of exclusive dealing. In general, exclusive dealing will be prohibited only where the practice is likely to have the effect of substantially lessening competition in a market.

29. This requirement, however, does not apply to two specific forms of exclusive dealing. One of these is where a person's ability to supply goods or services is entirely dependent on a licence, permit, authority or registration under a law of Australia and that person insists, as a condition of supply to another person, that the other person acquire all or part of his requirements of other goods or services directly or indirectly from the first mentioned person.

30. The other specific form of exclusive dealing to which

the requirement of reduction of competition does not apply is where a third person is involved. This covers the practice by which a supplier requires a customer to acquire other goods or services from a third person. This is often done pursuant to arrangements under which the supplier obtains a commission or other benefit on sales by the third person to the customer.

31. Clause 47 does not cover restraints that apply to suppliers. The clause will not cover the ordinary grant of an exclusive franchise to market a supplier's goods. The granting of such a franchise may not involve a restraint of trade or commerce. Where a restraint is involved, and where its effect on competition is significant, clause 45 will apply.

32. As mentioned in paragraph 9 above, a clearance procedure will enable clarification of the question whether clause 47 applies to a particular practice (clause 93).

33. The prohibition of exclusive dealing in clause 47 is subject to any authorization that may be granted under Part VII. Clause 47 will not operate until four months after the commencement of the Act (clause 2(4)) and in this period parties to existing arrangements will be able to seek clearances, authorizations or interim authorizations from the Commission.

Resale Price Maintenance

34. This practice is dealt with in clause 48 and Part VIII in the same way as in the existing Act, except that :

- (a) a corporation engaging in the practice will be liable to a pecuniary penalty as well as an injunction;

- (b) the provisions for exemptions in respect of the practice are omitted;
- (c) the definition of resale price maintenance is amended to ensure -
 - (i) that it covers action by a manufacturer to induce a retailer, who has obtained the manufacturer's goods through a wholesaler, to maintain resale prices specified by the manufacturer (clause 96(3)(b)); and
 - (ii) that it covers the practice by which a supplier stipulates minimum prices at which a distributor may advertise, as distinct from sell, goods (clause 96(7));
- (d) clause 100 clarifies the existing evidentiary provision; and
- (e) permissible methods of recommending resale prices are clarified (clause 97).

Price Discrimination

35. Clause 49 is to replace existing section 36(1)(a) and (b), which applies only to the obtaining of preferential terms by a threat or promise. Clause 49 prohibits both the granting and obtaining of prices which discriminate between purchasers of goods. The clause prohibits discriminatory pricing which is of such magnitude or is of such a recurring or systematic character that it is likely to have the effect of substantially lessening competition in a market, being a market in which the parties to the discriminatory dealing supply goods. There is no provision for authorizations and

negative clearances in relation to this practice.

Mergers

36. A merger (involving the acquisition of shares or assets) is prohibited by clause 50 if its likely effect will be to substantially lessen competition in a market.

37. The clearance procedure in clause 94 will, as mentioned in paragraph 9 above, enable the parties to a proposed merger, if they desire, to obtain the Commission's opinion on the application of clause 50 to their merger. Where a merger is covered by clause 50 it will be possible for the parties to seek an authorization from the Commission to proceed with the merger on the ground that it is justified (see paras. 40 to 48 below).

38. In addition the Commission will be able to provide general guidance information pursuant to clause 28(1)(a).

39. If a merger proceeds in contravention of clause 50 it will be liable to divestiture - i.e., the compulsory sale of shares or assets by direction of the Court (clause 81).

Authorizations

40. The Commission is to be able to grant authorizations to permit persons to engage in conduct which would otherwise be prohibited by the Act (clause 88).

41. Such authorizations may be granted in respect of -
 . contracts arrangements or understandings in restraint of trade or commerce (other than those, not being in connection with business conducted on a joint basis, fixing or controlling or providing for the fixing or controlling of prices for the supply of goods),

- . exclusive dealing,
- . mergers.

42. The provisions for authorizations in respect of mergers take account of the Companies (Foreign Take-overs) Act 1972. The broad objective is to avoid so far as possible duplication that could be involved in the examination of one merger under two Acts. Clause 89(7) requires copies of certain applications for authorizations in respect of mergers to be furnished to the Minister administering the Companies (Foreign Take-overs) Act. Clause 90(10) requires the Commission to defer consideration of such an application while the applicability of that Act is under consideration and clause 90(11) requires the Commission to authorize a merger that the Minister administering that Act has concluded is in the national interest.

43. Clause 90(9) requires the Commission to authorize a merger that is considered by the Government to be desirable in the interests of national economic policy.

44. The Commission may grant an interim authorization pending final determination of an application (clause 91(2)). Other provisions enable authorizations to be granted on conditions, or for a limited time (clause 91(1) and (3)).

45. Applications for authorizations, supporting submissions and the determinations of such applications will be kept in a public register (clause 89(3) and (4)), subject to provisions for the protection of confidential information where appropriate (clause 89(5)).

46. The Commission will be able to conduct a public hearing in relation to an application for an authorization where it considers this course to be desirable (clause 90(2)).

47. In determining applications for authorizations the Commission will be bound to have regard to the grounds set out in clause 90(5). The Commission must be satisfied that an authorization is justified by reason of a specific and substantial benefit resulting to the public from the practice in question.

48. The Commission will be able to revoke an authorization if it was granted on false or misleading information, if a condition of the authorization has not been complied with or if there has been a material change of circumstances (clause 91(4)).

Enforcement of restrictive trade practices provisions

49. A person who engages in a prohibited practice is liable to a pecuniary penalty. The amount of such a penalty is to be determined by the Court having regard to all relevant matters, including those matters specified in clause 76. The maximum amount in the case of a corporation is \$250,000 and in the case of a natural person \$50,000. Civil proceedings for the recovery of such a penalty may be instituted by the Attorney-General or the Commission (clause 77). Criminal proceedings are not available in respect of a breach of a prohibited practice (clause 78).

50. Clause 80 provides for an injunction to restrain a person from engaging in a prohibited practice. An application for such an injunction may be made to the Court by the Attorney-General, the Commission or by any other person.

51. A person who suffers loss or damage by reason of a prohibited practice may sue in the Court and recover as

damages the amount of his loss or damage (clause 82).

Exceptions

52. Clause 51 provides a number of exceptions to the restrictive trade practices that are prohibited. The exceptions cover a number of specific instances of conduct to which special considerations apply. They are generally in line with the exceptions in the existing Act. New exceptions in respect of covenants in contracts of employment and in partnership agreements have been included. Another new exception in respect of practices relating exclusively to exports has also been included but practices covered by this exception have to be notified to the Commission. The exception in respect of practices authorized by State legislation may now be withdrawn by regulations made under the Act. Clause 51(1)(a) removes doubts that the exemptions provided in relation to patents and other forms of industrial property are those provided in clause 51(3) and are not to be found under clause 51(1)(a).

53. The existing power to exempt primary industry arrangements by regulation is retained (clause 171(2)).

54. A power to exempt arrangements pursuant to or for the purposes of inter-governmental arrangements is provided in clause 171(3).

Overseas Cargo Shipping

55. The overseas cargo shipping provisions in Part X are the same as the provisions in the existing Act.

Transitional provisions

56. Necessary transitional provisions are included in Part XI. In particular, the Commission is authorized to retain the existing register, subject to the maintenance of confidentiality (clauses 148 and 149).

CONSUMER PROTECTION

57. The Bill prohibits a number of commercial practices that are unfair to consumers. Unlike the position with restrictive trade practices, there is no provision for persons to be authorized to engage in conduct that is otherwise prohibited. The Bill also includes provisions to prevent the exclusion from consumer transactions of certain conditions and warranties designed to protect the consumer. The Trade Practices Commission is given a role in the enforcement of the consumer protection provisions.

58. Most of the consumer protection provisions are contained in Part V. Division 1 of this Part deals with 'unfair practices'; Division 2 deals with conditions and warranties in consumer transactions. Some relevant provisions are also to be found in -

- (a) the definitions in clause 4(1) of 'special price' and 'unsolicited goods';
- (b) the provisions in clause 4(3) with respect to the meaning of a consumer;
- (c) the provisions in clause 6 for operation in reliance upon constitutional power other than the corporations power;
- (d) clause 28 - providing for the Commission to have

functions in relation to law reform, research and dissemination of information.

Unfair Practices Prohibited

59. The Bill prohibits the following practices -

- (a) misleading or deceptive conduct,
- (b) false representations,
- (c) deceptive offering of prizes in connection with promotion of goods or services,
- (d) misleading conduct to which Industrial Property Convention applies,
- (e) bait advertising,
- (f) referral selling,
- (g) accepting payment without intending to supply as ordered,
- (h) misleading statements about home-operated businesses,
- (i) coercion at place of residence,
- (j) pyramid selling,
- (k) supplying products that do not comply with safety standards,
- (l) supplying products without disclosing information required by product information standards, and
- (m) inertia selling (unsolicited goods and services), including certain practices involving entries in business directories.

These practices are discussed below.

60. Misleading or Deceptive Conduct : Conduct of this kind is dealt with in general terms in clause 52. The

operation of this clause overlaps that of other provisions in Division 1 of Part V. Breach of clause 52 gives rise to an injunction only - see the express exclusion of the clause from the offence provisions in clause 79.

61. False representations : Clause 53 prohibits a number of specific forms of false representations with respect to goods and services.

62. Deceptive offering of prizes in connection with promotion of goods or services : Clause 54 prohibits the offering of such prizes etc. with the intention of not providing them as offered.

63. Misleading conduct to which Convention for the Protection of Industrial Property as revised at Lisbon applies :

Conduct of this kind, i.e. conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of the goods, is prohibited by clause 55. This clause does not come into operation until the Convention enters into force for Australia - see clause 2(2).

64. Bait advertising : Clause 56 prohibits the advertising of a bargain which either does not exist, or unbeknown to customers is available for a very short time only, in order to attract customers to the advertiser's store.

65. Referral selling : Clause 57 prohibits the practice by which a supplier induces a consumer to acquire goods or services by indicating that the consumer, after paying for the goods or services, will get rebates or commissions on subsequent sales by the supplier to other persons whose names are provided by the consumer or who view the work done for the consumer by the supplier.

66. Accepting payment without intending to supply as ordered :

This practice is prohibited by clause 58.

67. Misleading statements about home-operated businesses :

This practice is prohibited by clause 59.

68. Coercion at place of residence : Clause 60 prohibits coercive conduct by salesmen or debt collectors at a person's place of residence.

69. Pyramid selling : Such selling is prohibited by clause

61. The actual prohibition is in sub-clauses (1) and (2).

Sub-clause (5) defines a scheme of the kind to which the clause applies.

70. Product Safety Standards : Clause 62 requires compliance with prescribed safety standards for consumer products.

Prescription of such standards is to be by regulation.

71. Product Information Standards : Clause 63 requires compliance with prescribed information standards in respect of consumer products.

72. Unsolicited Goods and Directory Entries : Clause 64 prohibits the assertion of a right to payment for unsolicited goods or directory entries. This provision does not apply if the person against whom a right to payment for goods is asserted ordinarily uses like goods in the course of his profession, business, trade or occupation. Sub-clause (9) provides that in proceedings in respect of a contravention the burden is on the supplier or the publisher to prove that it had reasonable cause to believe that there was a right to payment.

73. A person who has received unsolicited goods is relieved

by clause 65 of liability for loss or damage to the goods other than loss or damage resulting from the doing by him of a wilful and unlawful act.

Conditions and Warranties in Consumer Transactions

74. Division 2 of Part V provides for a number of conditions and warranties to apply to, and to be incapable of being excluded from, consumer transactions (the meaning of consumer being indicated in clause 4(3)).

75. Clause 67(a) prevents the inclusion in consumer contracts of provisions rendering Australian law inapplicable to contracts the proper law of which is otherwise Australian. Clause 67(b) prevents the substitution of provisions in the law of another country for provisions in Division 2.

76. Clause 68 renders void a term of a consumer contract that purports to exclude, restrict or modify the application of Division 2.

77. Clause 69 provides for certain conditions as to title, encumbrances and quiet possession to be implied in every consumer contract.

78. Clause 70 implies certain conditions in consumer contracts for the supply of goods by description.

79. Clause 71 implies certain undertakings in consumer contracts as to quality or fitness.

80. Clause 72 implies certain conditions in consumer contracts for the supply of goods by reference to sample.

81. Clause 73 deals with the rights of parties in hire-purchase transactions.

82. Clause 74 implies certain conditions in consumer contracts for the supply of services.

Concurrent Operation of State laws

83. This is provided for in clause 75.

Other Rights and Remedies

84. These are preserved by clause 75.

Enforcement of Consumer Protection Provisions

85. A contravention of a provision of Part V (other than the general provision in clause 52) is to be an offence. The maximum penalty for such an offence is to be, in the case of a corporation, a fine not exceeding \$50,000 and in the case of an individual, a fine not exceeding \$10,000 or imprisonment for not more than six months (clause 79). Provision for injunction is included in clause 80. A right to recover damages is conferred by clause 82. Apart from that right clause 87(2) empowers the Court, upon finding that there has been a contravention, to direct a refund of money or a payment to a person who has suffered loss or damage.

MISCELLANEOUS

86. Pending the establishment of the Superior Court of Australia, the Australian Industrial Court will have exclusive jurisdiction under the Act (clauses 86 and 168). The Australian Industrial Court has exclusive jurisdiction under the existing Act.

87. The extent to which the legislation will operate extra-territorially is indicated in clause 5. The definition of market in clause 4 is also relevant in this regard.

88. The Commission is given powers to obtain information and documents to assist it in the investigation of contraventions of the Act (clause 155).

89. Provision for legal aid under the legislation is contained in clause 169.

90. The Commission will be required to furnish an annual report (clause 170).